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1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

2 -----x  
3 UNITED STATES OF AMERICA

4 v.

16 CR 749 (RA)  
Plea

5 BORIS SHVARTS

6 Defendant

-----x

7 New York, N.Y.  
8 February 2, 2017  
2:30 p.m.

9 Before:

10 HON. RONNIE ABRAMS

11 District Judge

12 APPEARANCES

13 PREET BHARARA

14 United States Attorney for the  
Southern District of New York

15 DAVID W. DENTON, JR.

Assistant United States Attorney

16 MIRVIS & ASSOCIATES PC

17 Attorney for Defendant

18 TONY MIRVIS

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(In open court; case called)

THE DEPUTY CLERK: Counsel, state your name for the record.

MR. DENTON: Good afternoon, your Honor. David Denton for the government.

THE COURT: Good afternoon.

MR. MIRVIS: Good afternoon, Judge. Tony Mirvis appearing on behalf of Mr. Boris Shvarts, who is present to my right.

THE COURT: Good afternoon to both of you.

I understand, Mr. Shvarts, that you wish to plead guilty to Count One of the superseding indictment. Is that correct?

THE DEFENDANT: Yes.

THE COURT: So, before deciding whether to accept your plea, I'm going to ask you certain questions so that I can be sure that you understand your rights, that you're pleading guilty voluntarily, and that you're pleading guilty because you are guilty and not for some other reason. So, it's important that you answer my questions honestly and completely. If you are having trouble understanding anything or if you want to speak to your lawyer at any time, just let me know. OK?

Ms. @Cavalle, please place the defendant under oath.

(Defendant sworn)

THE COURT: You are now under oath. You should know

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1 that if you answer any of my questions falsely, you could be  
2 charged with a separate crime of perjury. Do you understand  
3 that?

4 THE DEFENDANT: Yes.

5 THE COURT: I'm going to start by asking you questions  
6 to be sure you are competent to plead guilty. I ask this of  
7 every defendant who seeks to plead guilty.

8 How old are you?

9 THE DEFENDANT: 26-years-old.

10 THE COURT: How far did you get in school?

11 THE DEFENDANT: Second year of college.

12 THE COURT: Have you ever been treated or hospitalized  
13 for mental illness?

14 THE DEFENDANT: No, I have not.

15 THE COURT: Have you ever been addicted to drugs or  
16 alcohol?

17 THE DEFENDANT: No, I have not.

18 THE COURT: In the past 24 hours, have you taken any  
19 drugs, medicine or pills or drunk any alcoholic beverages?

20 THE DEFENDANT: No, I have not.

21 THE COURT: Is your mind clear today? And by that I  
22 mean, do you understand what's happening in these proceedings?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: Does either counsel have any doubt as to  
25 defendant's competence to plead guilty?

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1 MR. DENTON: No, your Honor.

2 MR. MIRVIS: I do not, Judge.

3 THE COURT: On the basis of Mr. Shvarts' responses to  
4 my questions, my observations of his demeanor here in court and  
5 representations of counsel, I find that he is fully competent  
6 to enter an informed plea at this time.

7 Have you had enough time and opportunity to discuss  
8 your case with your attorney including the nature of the  
9 charge, any possible defenses, and the rights you will be  
10 giving up by pleading guilty?

11 THE DEFENDANT: Yes.

12 THE COURT: Has your attorney discussed with you the  
13 consequences of pleading guilty?

14 THE DEFENDANT: Yes, of course.

15 THE COURT: Are you satisfied with his representation  
16 of you?

17 THE DEFENDANT: Yes, I am.

18 THE COURT: Now, what I'm going to do is I am going to  
19 explain to you certain constitutional rights that you have.  
20 These are rights that you will be giving up if you enter a  
21 guilty plea.

22 So, first, under the Constitution and laws of the  
23 United States, you have a right to plead not guilty to the  
24 charge in the superseding indictment. Do you understand that?

25 THE DEFENDANT: Yes, I do.

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1 THE COURT: If you did plead not guilty, you'd be  
2 entitled under the Constitution to a speedy and public trial by  
3 jury of that charge. Do you understand that?

4 THE DEFENDANT: Yes, I do.

5 THE COURT: In advance of trial, you would have the  
6 opportunity to seek suppression of any or all of the evidence  
7 against you on the basis that it was obtained in violation of  
8 the Constitution. Do you understand that?

9 THE DEFENDANT: Yes, I do.

10 THE COURT: At trial, you would be presumed to be  
11 innocent. That means that you would not have to prove that you  
12 were innocent. Instead, the government would need to prove  
13 your guilt beyond a reasonable doubt before you could be found  
14 guilty. So even if you did nothing or said nothing at trial,  
15 you could not be convicted unless a jury of 12 people agreed  
16 unanimously that you are guilty. Do you understand that?

17 THE DEFENDANT: Yes, I do.

18 THE COURT: During trial, the witnesses for the  
19 prosecution would have to come to court and testify in your  
20 presence where you could see them and hear them, and your  
21 lawyer could cross-examine those witnesses. If you wanted to,  
22 your lawyer could offer evidence on your behalf. You would be  
23 able to use the Court's power to compel or force witnesses to  
24 come to court and testify truthfully in your defense, even if  
25 they didn't want to come. Do you understand that?

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1 THE DEFENDANT: Yes, I do.

2 THE COURT: At trial, you would have the right to  
3 testify if you wanted to, but you would also have the right not  
4 to testify. And if you chose not to testify, that could not be  
5 used against you in any way. So no inference or suggestion of  
6 guilt could be made from the fact that you chose not to  
7 testify. Do you understand that?

8 THE DEFENDANT: Yes, I do.

9 THE COURT: At trial, and at every stage of your case,  
10 you would be entitled to be represented by an attorney, and if  
11 you could not afford an attorney, one will be appointed at  
12 public expense, meaning free of cost, to represent you. Do you  
13 understand that?

14 THE DEFENDANT: Yes, I do.

15 THE COURT: As I said before, you have the right to  
16 plead not guilty. So, even as you sit here right now for  
17 purposes of entering a guilty plea, you have the right to  
18 change your mind and go to trial. But if you do plead guilty  
19 and I accept your plea, there will be no trial, and you will  
20 have to give up the rights that I just described.

21 If you plead guilty, all that will remain to be done  
22 is for the Court, for me, to impose sentence. I will enter a  
23 judgment of guilty, and I'll sentence you on that basis after  
24 getting whatever submissions I get from you, your attorney, the  
25 government, as well as a presentence report prepared by the

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1 probation department. There will be no appeal with respect to  
2 whether the government could use the evidence it has against  
3 you or with respect to whether you did or did not commit a  
4 crime. Do you understand that?

5 THE DEFENDANT: Yes, I do.

6 THE COURT: If you plead guilty, you should also  
7 understand that you have to give up your right not to  
8 incriminate yourself since I'm going to ask you certain  
9 questions here in court today in order to assure myself that  
10 you are guilty. OK?

11 THE DEFENDANT: Yes.

12 THE COURT: As we discussed, I understand you seek to  
13 plead guilty to Count One of the superseding indictment which  
14 charges you with conspiring to commit wire fraud in violation  
15 of Title 18 United States Code, Section 1349. Is that correct?

16 THE DEFENDANT: Yes, it is.

17 THE COURT: Mr. Denton, could you please state the  
18 elements of that offense?

19 MR. DENTON: Yes, your Honor. A violation of Title 18  
20 United States Code, Section 1349 has two elements:

21 First, that two or more persons in some way or manner  
22 agreed to try and accomplish a common and unlawful plan to  
23 commit wire fraud in violation of Title 18 United States Code,  
24 Section 1343 as charged in the indictment;

25 And, second, that the defendant knew the unlawful

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1 purpose of the plan and willfully joined in it.

2 The object of the conspiracy to violate Title 18  
3 United States Code, Section 1343 itself has three elements:

4 First, that the defendants devised a scheme to defraud  
5 or obtain money or property by materially false or fraudulent  
6 pretenses, representations or promises, or that they willfully  
7 participated in such a scheme with knowledge of its fraudulent  
8 nature;

9 Second, that the defendants acted with the intent to  
10 defraud;

11 And, third, that in advancing further or carrying out  
12 the scheme, the defendants transmitted any writing, signal or  
13 sound by means of wire, radio or television communication in  
14 interstate commerce or caused the transmission of any such  
15 signal in interstate commerce. The government would also be  
16 obliged at trial to prove that the venue is proper in the  
17 Southern District of New York by preponderance of the evidence.

18 THE COURT: Thank you.

19 Mr. Shvarts, do you understand if you were to go to  
20 trial, the government would need to prove all of those things  
21 to a jury?

22 THE DEFENDANT: Yes, I understand.

23 THE COURT: Now, I'm going to discuss the maximum  
24 penalties for this crime. The maximum means the most that  
25 could possibly be imposed. It doesn't necessarily mean it's



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1 the sentence you will receive, but you have to understand that  
2 by pleading guilty, you're exposing yourself to the possibility  
3 of receiving any combinations of punishments up to the maximum  
4 I am about to describe.

5 So, first, with respect to your liberty, the maximum  
6 term of imprisonment for this crime is 20 years in prison. Do  
7 you understand that?

8 THE DEFENDANT: Yes, I understand.

9 THE COURT: That term or any term of imprisonment, I  
10 should say, may be followed by a term of supervised release of  
11 up to three years. Supervised release means that if you're  
12 sentenced to prison, after your release from prison, you'll be  
13 subject to the supervision of the probation department. You'll  
14 be required to obey certain rules. If you violate those rules,  
15 you could be returned to prison without a jury trial to serve  
16 additional time even beyond your original sentence. Do you  
17 understand that?

18 THE DEFENDANT: Yes, I do.

19 THE COURT: You should also understand there is no  
20 parole in the federal system. So if you're sentenced to  
21 prison, you will not be released early on parole, although  
22 there's a limited opportunity to earn credit for good behavior.  
23 Do you understand that?

24 THE DEFENDANT: Yes, I do.

25 THE COURT: In addition to those restrictions on your

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1 liberty, the punishment for this crime includes certain  
2 financial penalties. The maximum allowable fine is \$250,000 or  
3 twice the gain you received from the crime or twice the loss to  
4 any victims, whichever is greater. And I'm required to impose  
5 a mandatory special assessment of \$100. Do you understand  
6 that?

7 THE DEFENDANT: Yes, I understand.

8 THE COURT: In addition, I must order restitution to  
9 any persons or entities injured as a result of your criminal  
10 conduct, and I can order you to forfeit all property derived  
11 from the offense or used to facilitate the offense. Do you  
12 understand that those are the maximum penalties for this crime?

13 THE DEFENDANT: Yes, I understand the maximum  
14 penalties.

15 THE COURT: Now, you should be aware that the  
16 punishment that I've just described are ones that may be part  
17 of a sentence, but being convicted of a felony may have other  
18 consequences. Are you a United States citizen?

19 THE DEFENDANT: No, I'm not.

20 THE COURT: Then you should understand that as a  
21 result of your guilty plea, you may be removed from the United  
22 States, and that in certain circumstances removal may be likely  
23 or even mandatory. Do you understand that?

24 THE DEFENDANT: Yes, I do.

25 THE COURT: You should also understand that you may be

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1 denied citizenship or admission into the United States. Do you  
2 understand that?

3 THE DEFENDANT: Yes, I understand.

4 THE COURT: Did you discuss the possible immigration  
5 consequences of your plea with your attorney?

6 THE DEFENDANT: Yes, I have.

7 THE COURT: Now, in imposing sentence, federal judges  
8 are required to consider the Federal Sentencing Guidelines.  
9 The guidelines are a complicated set of rules for determining  
10 an appropriate sentence. And although judges must take into  
11 account the Sentencing Guidelines in determining a sentence, in  
12 the end, the judge is required to give the sentence that she  
13 believes best satisfies the purposes of the criminal law set  
14 forth in a provision of the law, 18 United States Code, Section  
15 3553(a) even if it's higher or lower than the guidelines  
16 recommendation. Have you discussed the Sentencing Guidelines  
17 with your attorney?

18 THE DEFENDANT: Yes, I have.

19 THE COURT: Do you understand that they are only  
20 recommendations to the Court?

21 THE DEFENDANT: Yes, I do.

22 THE COURT: Now, I understand that you've entered into  
23 a written plea agreement with the government. Is that correct?

24 THE DEFENDANT: Yes, I did.

25 THE COURT: I see what appears to be the original

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1 agreement. It's dated January 26, 2017. I'm going to mark it  
2 as Court Exhibit 1, and I'm going to ask you if that's your  
3 signature on the final page.

4 THE DEFENDANT: Yes, that's my signature.

5 THE COURT: Did you read this agreement before signing  
6 it?

7 THE DEFENDANT: Yes, I did.

8 THE COURT: I realize that it's a long document and  
9 contains some technical legal language, but after reading it  
10 and discussing it with your attorney, do you understand all the  
11 terms of the agreement?

12 THE DEFENDANT: Yes, I do.

13 THE COURT: I'm going to ask the government to  
14 summarize the terms of the agreement, please.

15 MR. DENTON: Yes, your Honor. The terms of the  
16 agreement stipulate that the defendant agrees to certain  
17 calculations in the Sentencing Guidelines. In particular, as  
18 relevant here, a loss amount that falls within the range of  
19 \$250,000 to \$550,000, which results in a stipulated guidelines  
20 range of 37 to 46 months' imprisonment.

21 The defendant agrees not to challenge by appeal or any  
22 other collateral attack any sentence that is within or below  
23 the stipulated guidelines range. The government in turn agrees  
24 not to appeal any sentence that is within or above the  
25 stipulated guidelines range. The defendant agrees not to file

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1 a direct appeal with respect to any aspect of the government's  
2 production of discovery or Giglio material to the defendant.  
3 And, finally, the defendant also agrees that should his  
4 conviction be vacated for any reason, he may be re-prosecuted  
5 without regard to the statute of limitations.

6 THE COURT: Did you understand all of that?

7 THE DEFENDANT: The last part.

8 THE COURT: Do you want to repeat the section with  
9 respect to the statute of limitations?

10 MR. DENTON: Yes, your Honor.

11 On page 5 of the agreement, the first full paragraph,  
12 it provides that the defendant agrees that in the event that  
13 his conviction is vacated here for any reason, any statute of  
14 limitations that might otherwise time bar prosecution of the  
15 offense charged in the indictment will not apply, and the  
16 government will be able to prosecute him notwithstanding the  
17 passage of time.

18 THE COURT: Does that make sense to you?

19 THE DEFENDANT: Yeah, it makes sense.

20 THE COURT: I'm just going to discuss a couple of  
21 those terms. As Mr. Denton said, you and the government have  
22 agreed that the appropriate guideline sentencing range here is  
23 37 to 46 months in prison. That means that neither you nor the  
24 government can argue for a different guidelines calculation,  
25 although you can seek a sentence outside of that range. Do you

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1 understand that?

2 THE DEFENDANT: Yes, I do.

3 THE COURT: So you should understand that the  
4 agreement doesn't bind me in any way. I'm required to make my  
5 own independent calculation under the guidelines and to impose  
6 a sentence based on what I believe is appropriate in this case.  
7 So, you should understand that my calculation may differ from  
8 the one that you've agreed to with the government. I'm not  
9 saying it will, but if it does, you won't be allowed to  
10 withdraw your plea. Do you understand that?

11 THE DEFENDANT: Yes, I understand.

12 THE COURT: In addition, with respect to the waiver of  
13 appeal, you should understand that under this agreement, you're  
14 giving up your right to appeal or otherwise challenge your  
15 sentence as long as I sentence you to 46 months of imprisonment  
16 or less. So if I sentence you to more than 46 months in  
17 prison, you have the right to appeal or otherwise challenge  
18 your sentence under this agreement; but if your sentence is 46  
19 months or less, you can't appeal under this agreement. Does  
20 that make sense?

21 THE DEFENDANT: Yes, it makes sense.

22 THE COURT: Also, with respect to your citizenship,  
23 you should understand that you cannot appeal on the basis of  
24 any actual or perceived immigration consequences, including  
25 deportation, resulting from your guilty plea or conviction. Do

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1 you understand that as well?

2 THE DEFENDANT: Yes, I understand.

3 THE COURT: Did you willingly sign this agreement?

4 THE DEFENDANT: Yes, I did.

5 THE COURT: Did anyone threaten, bribe or force you to  
6 sign the plea agreement or to plead guilty?

7 THE DEFENDANT: No, they did not.

8 THE COURT: Other than what's in the plea agreement,  
9 has anyone offered you any inducement to plead guilty?

10 THE DEFENDANT: What does that mean?

11 THE COURT: Did they make any other promises to you --

12 THE DEFENDANT: Oh, no, they did not.

13 THE COURT: -- or is there anything else that they are  
14 giving you in any way or anything else that makes you want to  
15 plead guilty other than what's in the plea agreement?

16 THE DEFENDANT: No.

17 THE COURT: Has anyone made any promise to you as to  
18 what your sentence will be?

19 THE DEFENDANT: No, they have not.

20 THE COURT: The reason I ask that question is I want  
21 to make sure that you understand that even if anyone attempted  
22 to predict what your sentence will be, that their prediction  
23 could be wrong. I say that because you should understand that  
24 no one -- not your attorney not the prosecutor, not even I --  
25 can be sure today what your sentence will be because that won't

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1 be determined until I receive a presentence report, until I've  
2 decided what the correct calculation of the range recommended  
3 by the Sentencing Guidelines is, and whether there's any basis  
4 for not following that recommendation.

5 So even if the sentence is different from what anyone  
6 may have predicted or different from what you had hoped for,  
7 you still won't be allowed to withdraw your plea on that basis.  
8 Do you understand that?

9 THE DEFENDANT: Yes, I understand.

10 THE COURT: So now that you've been advised of the  
11 charge against you and the possible penalties you face and the  
12 rights you're giving up, is it still your intention to plead  
13 guilty?

14 THE DEFENDANT: Yes, it is.

15 THE COURT: I'm going to ask you the official question  
16 now. With respect to Count One of the superseding indictment,  
17 how do you plead?

18 THE DEFENDANT: I plead guilty.

19 THE COURT: So now tell me in your own words what you  
20 did that makes you believe you are guilty of this offense.

21 THE DEFENDANT: From March 2016 to April 2016, I  
22 conspired with others to defraud the Apple stores in the  
23 Southern District of New York.

24 THE COURT: When you did that, did you know that what  
25 you were doing was wrong and was illegal?



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1 THE DEFENDANT: Yes, I did.

2 THE COURT: Did you use in any way the wires? And by  
3 that I mean, computers or phones or anything else as part of  
4 this agreement?

5 THE DEFENDANT: Yes, I did.

6 THE COURT: Mr. Denton, are there any additional  
7 questions you'd like me to ask?

8 MR. DENTON: No, your Honor.

9 THE COURT: Could you please summarize what the  
10 government's evidence would be if the case were to go to trial.

11 MR. DENTON: Yes, your Honor.

12 At trial, the government would prove the defendant's  
13 involvement in the charged conspiracy through video evidence,  
14 records of financial transactions, including wire transmissions  
15 and witness testimony indicating the defendant's involvement in  
16 a scheme to defraud retail stores operated by the technology  
17 company Apple in the Southern District New York and elsewhere.

18 THE COURT: Do the government and defense counsel  
19 agree that there is a sufficient factual predicate for the  
20 guilty plea?

21 MR. DENTON: Yes, your Honor.

22 MR. MIRVIS: Yes, your Honor.

23 THE COURT: Mr. Shvarts, because you acknowledge that  
24 you are in fact guilty as charged in the indictment; because  
25 I'm satisfied that you understand your rights, including your

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1 right to go to trial; and that you are aware of the  
2 consequences of your plea, including the sentence which may be  
3 imposed; and because I find that you are knowingly and  
4 voluntarily pleading guilty, I accept your guilty plea to Count  
5 One of the superseding indictment.

6 The probation department will want to interview you in  
7 connection with the presentence report that I mentioned  
8 earlier.

9 Does defense counsel wish to be present?

10 MR. MIRVIS: Absolutely, Judge. Yes.

11 THE COURT: I order that it not take place without  
12 your presence. If you choose to speak to the probation  
13 department, please make sure everything you say is truthful and  
14 accurate. I will read that report very carefully. It will be  
15 important to me in deciding what sentence to impose.

16 If there are any errors in it, you should let your  
17 attorney know. You can challenge anything that's in that  
18 presentence report in advance of sentencing and at the  
19 sentencing itself.

20 We are going to set the sentencing on for, is it  
21 May 12? Is that right? And I think earlier you talked about  
22 2:00. We're going to make it 4:00. So May 12 at 4:00.

23 The government shall provide the probation officer  
24 with its factual statement within one week. Defense counsel  
25 shall arrange for the defendant to be interviewed by the

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1 probation department in the next two weeks.

2 I would just like counsel to be familiar with my  
3 individual rules and practices in criminal cases which contain  
4 some rules regarding sentencing submissions, among other  
5 things. Defense counsel submissions are due two weeks prior to  
6 sentencing, and the government submission is due one week prior  
7 to sentencing.

8 There is a forfeiture allegation in this indictment as  
9 well. I don't believe that I asked, Mr. Shvarts, do you admit  
10 or deny the forfeiture allegation in the indictment?

11 THE DEFENDANT: I admit it.

12 THE COURT: All right. Now, the defendant shall  
13 remain in custody pending sentence. Are there any other  
14 applications at the time?

15 MR. MIRVIS: Judge, I wanted to make an application  
16 for Mr. Shvarts to remain at MCC. I believe there's a chance  
17 that they may move him to MDC. He's currently enrolled in, I  
18 think, five or six different types of programs at the MCC, so I  
19 just wanted him to be able to finish.

20 THE COURT: Ultimately, it's up to the facility or to  
21 the marshals, but I will make that recommendation.

22 MR. MIRVIS: Thank you very much, Judge.

23 THE COURT: We are adjourned. Thank you.

24 MR. DENTON: Thank you, your Honor.

25 (Adjourned)